No. 15,355

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

GILBERT, NISSEN & IRVIN,
117 West Ninth Street,
Los Angeles 15, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEES' PETITION FOR REHEARING.

To the Honorable William Denman, Walter L. Pope, and Stanley N. Barnes, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

COME NOW appellees and within proper time pursuant to Rule 23 of the above-entitled court, file this, their petition for rehearing, respectfully calling attention of the court to the following material matters of law and fact inadvertently overlooked or misconstrued by the court as shown by the face of its opinion:

I.

This Court, in reversing the judgment against the appellant San Francisco Sheet Metal Contractors Association inadvertently disregarded the undisputed fact that

said appellant association is not an "employer" within the meaning of Section 302 of the Labor Management Relations Act, 1947, and has not itself paid nor been compelled to agree to pay any "money or other thing of value" to the Joint Industry Board Fund or to any defendant, so that, even under the rule of law set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against this particular appellant.

II.

This Court, in reversing the judgment against the 20 appellant employees (other than the eight appellant employers who undertook to perform jobs or contracts in the northern counties and made payments to the fund in question), inadvertently disregarded the undisputed fact that said 20 appellant firms and corporations have not paid nor been compelled to agree to pay anything to the Joint Industry Board Fund or to any defendants, so that, even under the rule of law set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against these particular appellants.

III.

This Court, in reversing the judgment in favor of the appellees Sheet Metal Workers International Association and its Local Union No. 104, inadvertently disregarded the undisputed fact as disclosed by the record herein that these appellee labor organizations have neither received, accepted, nor undertaken to solicit or compel any payments to the Joint Industry Board, so that they were entitled to recover a judgment of dismissal on that ground alone, even under the rule of law set forth in the Court's opinion.

IV.

This Court relied in its opinion upon the fact that payments to the Joint Industry Board did not fall within any of the exceptions stated in subdivision (c) of Section 302 and, in part, rejected the *Essex Transportation Co.* case, 216 F. 2d 410, as persuasive authority on the mistaken ground that there the Third Circuit was dealing with a "welfare fund" which "may well have come within the exception" set forth in subdivision (c)(5) of Section 302, thereby inadvertently overlooking the legislative history of the statutory provision which discloses that Congress did not intend to prohibit payments to all jointly-controlled trust funds not set up for a purpose specified in Section 302(c), and likewise overlooking the fact that the *Essex* case involved an oral agreement to make payments to a pension trust fund so that the welfare trust fund exception of Section 302(c)(5) could not have been applicable.

V.

This Court inadvertently misconstrued the language of 29 U. S. C., Sec. 152(5) which refers to *"dealing with employers concerning grievances, etc."* by overlooking various available aids to the proper interpretation of that language which establish that it is synonymous with "collective bargaining" which is conducted by individuals who represent organizations authorized by the employees to act for them in dealings with their employers, so that this Court's interpretation is in conflict with the *Ryan* decision, 350 U. S. 299.

VI.

This Court inadvertently misconstrued the language of 29 U. S. C., Sec. 152(5) which refers to *"any organiza-*

tion of any kind . . . in which employees participate" by concluding that such language contemplated "participation by representation," thus overlooking various available aids to its proper interpretation which establish that it does not apply to organizations formed by good faith collective bargaining and operated jointly by an employer association and a bona fide labor union, which union is not itself employer-dominated or employer-controlled contrary to 29 U. S. C., Sec. 158(a)(2).

VII.

This Court inadvertently overlooked material provisions of the Joint Industry Board Trust Agreement which, as found by the Trial Court, expressly provide for the separate character of the Joint Industry Board from either the Employer Association or the Union and expressly preserve their duties and relationships with respect to each other and each of them with respect to their members, thereby mistakenly concluding that the Joint Industry Board is "a mere adjunct of the union" and not an "independent unit or entity."

VIII.

This Court inadvertently overlooked material provisions of the Joint Industry Board Trust Agreement which, as the Trial Court found, provide that all decisions of the Joint Industry Board must be made with the concurrence of a majority of the employer members as well as a majority of the union members and make the power to expend any and all funds contributed by the employers or to render any other decisions dependent upon the approval of the employer members and further provide that if the employer members refuse to sanction

any expenditure or concur in any decision, for any reason, such disagreement shall be settled through arbitration by an "impartial person who shall act as an arbitrator," designated in the absence of joint selection by the president of the University of San Francisco, so that this Court mistakenly concluded that decisions making concessions to the employers could only be made by union action.

IX.

This Court inadvertently disregarded the express finding of the Trial Court that all members of the Joint Industry Board hold the funds in question in trust for the purposes enumerated in the Trust Agreement, which finding was supported by substantial evidence including the stipulated fact that the union-appointed members of the Board "were and are acting as such trustees," thereby mistakenly concluding contrary to the true facts and without any supporting evidence or findings in the record that said union-appointed members "were compelled to take orders from the union" in violation of their fiduciary duties as trustee.

Appellees respectfully pray the Court to grant a rehearing herein, based upon the foregoing grounds.

Dated: Los Angeles, California, October 14, 1957.

Respectfully submitted,

GILBERT, NISSEN & IRVIN,

By ROBERT W. GILBERT,

Attorneys for Appellees.

Certificate of Counsel.

The undersigned, Robert W. Gilbert, counsel of record for appellees, hereby certifies that the above and foregoing petition for rehearing in his judgment is well founded and that it is filed in good faith and not interposed for delay.

ROBERT W. GILBERT.

No. 15,355

IN THE

United States Court of Appeals

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SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

BRIEF IN SUPPORT OF APPELLEES' PETITION FOR REHEARING.

I.

The Appellant Contractors Association Is Not an Employer Within the Meaning of Section 302 Which Paid or Agreed to Pay Anything to the Joint Industry Board Fund, or Was Asked to Do So.

Although the appellees endeavored to point out to this Honorable Court of Appeals that the appellant Sheet Metal Contractors Association of San Francisco "is not itself an 'employer' within the meaning of Section 302 and has not itself paid nor been compelled to agree to pay any 'money or other thing of value' to the Joint Industry Board Fund or to any defendant" (Appellees' Br. pp. 33-34), the Court's opinion herein reverses the

judgment as to all the plaintiffs and appellants, including said Association, and makes a blanket declaration that—

> ". . . the allegations of the complaint, plus the stipulations of the parties, set forth facts sufficient to entitle *the plaintiffs* to an injunction against *further demand.*" (Opinion, p. 15. Emphasis added.)

Subdivision (c) of Section 302 confers jurisdiction upon the district courts to restrain violations of that section (Opinion, p. 2, fn. 2 and accompanying text), *i.e.* to issue injunctions against payment or delivery of any money or thing of value to an employee representative by an employer; receipt or acceptance of any money or other thing of value from an employer by such representative; or agreeing to do so. (Opinion, p. 1, fn. 1 and accompanying text).

As to the appellant Contractors Association, the "Answer" herein expressly denied that it is an "employer of employees engaged in an industry affecting commerce within the meaning of Section 302" [R. 12] and that appellees are attempting to cause and compel it to pay and deliver money and other things of value to the Joint Industry Board [R. 13]. Neither the "Complaint" [R. 3-11] nor the "Stipulation of Facts" [R. 16-21] allege or set forth any facts which would support a finding adverse to the appellees on these two issues raised by the pleadings.

Accordingly, we respectfully submit that this Honorable Court's opinion should be modified by affirming the judgment below with respect to the appellant Contractors Association.

II.

Twenty of the Appellant Employers Did Not Pay or Agree to Pay Anything to the Joint Industry Board Fund, nor Were They Asked to Do So.

Appellees similarly endeavored to emphasize before this Honorable Court of Appeals that eight named San Francisco sheet metal contractors (Apex Sheet Metal Works; Atlas Heating and Ventilating Co., Ltd.; Gilmore Air Conditioning Service; Scott Co.; Western Plumbing & Heating Co., Inc.; Ace Sheet Metal Works; Valley Sheet Metal Co. and Otis Sheet Metal, Inc.) employing members of Local 104 in the Northern California counties were the only appellant employers making the questioned payments into the Joint Industry Board Fund or who in any manner have been asked to do so or to agree to do so. (Appellee's Br. pp. 32-33; *Cf.* Opinion, pp. 2, 4, and 5.)

Nowhere does the "Complaint" allege nor the "Stipulation of Facts" disclose that any of the 20 remaining appellant employers who are members of the San Francisco Contractors Association have *ever* carried on jobs in the Northern California counties or moved their work forces into the area of Local Union 75, or even expressed a desire to do so.

As this Court correctly stated in its opinion (p. 5), appellants claimed that the payments to the Joint Industry Board Fund by the eight above-mentioned employers which had been induced by strike threats of Local 75 were made unlawful under Section 302(a) and that the acceptance of such payments by the Joint Industry Board was in violation of Section 302(b) and based on those claims asserted that "they (sic) are entitled to an injunc-

tion to restrain such violations of §302 under the provisions of subdivision (e)".

Even under the interpretation of Section 302 set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against the 20 appellant employers who did not pay or agree to pay anything to the Joint Industry Board Fund, and were not even asked so to do, so far as the record herein discloses. For that reason, we respectfully urge that this Honorable Court's opinion should be modified to affirm the judgment below with respect to these particular appellants.

III.

The Appellee International Union and Its Local 104 Did Not Receive, Accept, nor Undertake to Solicit or Compel Any Payments to the Joint Industry Board Fund.

As reflected in their brief (pp. 34-35), the Sheet Metal Workers International Association and its Local Union 104, defendants and appellees herein, have neither received, accepted nor sought to solicit or compel the questioned payments herein. The "Stipulation of Facts" [R. 20-21] conclusively shows that no payments were made or agreed to be made by any of the plaintiff employers except to the Joint Industry Board Fund and that no efforts to secure the making of such payments were undertaken by any of the defendants except Local 75. (*Cf.* Opinion, p. 5, par. 1.)

Since there is absolutely no evidence in the instant record which would support a finding that the Sheet Metal Workers International Association and Local 104 have engaged in or threatened to engage in any violations of Section 302, the district court lacked jurisdiction

to grant injunctive relief against them (see Appellees' Br. pp. 66-67). Therefore, the Court's opinion should be modified by affirming the judgment below with respect to these particular appellees.

IV.

Congress Did Not Intend to Prohibit Payments to All Jointly-Controlled Labor-Management Trust Funds Not Coming Within the Exceptions Stated in Subdivision (c) of Section 302.

By implication at least, the Court's opinion herein adopts the conclusion that the only labor-management trust fund payments permitted by Section 302 are those falling within the "exceptions" stated in subdivision (c), the most important being funds to provide employee health and welfare and pension benefits. (Opinion, p. 9, fn. 6 and accompanying text.)

Thus, the decision in *United Marine Division v. Essex Transportation Co.*, 216 F. 2d 410 (C. A. 3rd), relied upon by the trial court herein, was rejected as persuasive authority by this Honorable Court in part because of its stated conclusion that "the quoted language *may well be mere dictum* for it indicates that the court was dealing with a welfare fund which *may well have satisfied the exception* to the general language of §302 which is set forth in subdivision 5. . . ." (Opinion, p. 13. Emphasis added.)

As pointed out in Appellees' Brief (pp. 37-38), the *Essex* case could not have been decided on the basis of a finding of compliance with the welfare trust fund requirements of Section 302(c)(5), since it arose out of a suit brought by a plaintiff union to compel payments to trustees of a pension trust based upon an *oral agreement*

by the defendant employer. (See *Annotation; Labor Management Relations Act*—Sec. 302, 100 L. Ed. 343, 345.) One of the "elaborate qualifying provisos" referred to in footnote 6 of the Court's opinion herein as "strictly limiting the use of such funds and the manner in which they may be set up" is that listed in Section 302(c)(5)(B), which requires that—

> "the detailed basis on which such payments are to be made is specified in a *written agreement with the employer* . . ." (29 U. S. C., Sec. 186(c)(5)(B). Emphasis added.)

Just following the language quoted at page 13 of this Honorable Court's opinion, Circuit Judge Goodrich stated for the unanimous Third Circuit Court that—

> "We think that the [oral] promise in this case is outside the evil which Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an application of the statute to void this type of arrangement which has met with legislative sanction, judicial approval, and is a growing trend in employer-employee relations."

While it is conceded that the Supreme Court of the United States rejected a "narrow construction" of Section 302 that "would frustrate the primary intent of Congress" (*United States v. Ryan,* 350 U. S. 299, 304, quoted by the Opinion herein at p. 14), the Fourth Circuit concluded after the *Ryan* decision, as had the Third Circuit previous thereto, that Section 302—

> "is not to be stretched to cases not covered, merely because it may seem to a court that Congress would have done well to cover them. Even when the

court may feel that if the omission had been called to the attention of Congress, it might have written the statute differently to cover the omitted case, the Court is not empowered to exercise the task of revision." (*Ventimiglia v. United States*, 242 F. 2d 620 (C. A. 4th), decided March 11, 1957.)

Nothing in the unanimous opinion of Mr. Justice Clark in the *Ryan* case supports the contention of the appellants in this case, indirectly approved by this Honorable Court's opinion, that Congress intended to forbid all payments of any kind to all types of joint labor-management trust funds "however laudable their purpose might be" and "however carefully administered and audited", simply because "the fund is to be used for purposes jointly agreed upon by the union and the employers which are not purposes specified and permitted by Section 302" in subdivision (c) of that section. (*Cf.* Appellants' Op. Br. pp. 7, 27.)

Although this Court concluded that "a mere reading of §302 demonstrates the fallacy of any such position" (Opinion, p. 13), the United States Department of Justice officially expressed to the Congress "some doubt that the section prohibits payments to a board of trustees composed of representatives both of employer and employees, even if not set up for a purpose permitted by the section" (Appellees' Br. pp. 24-25). Moreover, the Congress itself has recognized the necessity for amending the statute so that it will contain "clear and unmistakeable language to the effect that no money may be paid to any trust which is the subject of collective bargaining except in accordance with the limitations enumerated in section 302(c)(5)." (See Appellees' Br. p. 22; also pp. 25-27.)

Despite the absence of such legislative amendment by the Congress to date, the ruling in this case, if permitted to stand without modification, substantially impairs the validity of numerous trust funds created through collective bargaining for administration of joint labor-management programs for *apprenticeship training; disputes settlement and voluntary arbitration; industrial safety,* etc., etc., although other courts have consistently recognized that joint labor-management cooperation is a "social device to be encouraged". (See cases cited at Appellees' Br. pp. 28-29 and *Bay Area Painters Joint Committee v. Orack,* 102 Cal. App. 2d 81, 85-86, 226 P. 2d 644, quoted therein at p. 47.) The Congress of the United States has specifically adopted legislation for the purpose of fostering the creation of joint labor-management machinery for *apprenticeship training, disputes settlement and voluntary arbitration, industrial safety,* and the like. (See Appellees' Br. pp. 53-55 and 57-59.) Our production experience during World War II disclosed that some 5,000 labor-management committees organized in factories, mines and shipyards throughout the United States under the auspices of the War Production Board, an agency of the Federal Government, made a substantial contribution to the national defense through the promotion of industrial peace and labor-management cooperation. (de Schweinitz, *Labor and Management in a Common Enterprise* (Harvard University Press), pp. 4-6.) As a result, the growing trend in employer-employee relations toward the development of joint labor-management cooperation through bi-partite boards or committees has been encouraged by legislative bodies and by other courts as a matter of public policy.

Appellants themselves made reference to the 1957 proposal of Secretary of Labor Mitchell to amend Section 302 of the Taft-Hartley Act so that employers may continue to pay money into trust funds for the support of *jointly-administered apprenticeship and training programs in the building and construction industry,* but subject to the *new condition* that "the requirements of clause (B) of the proviso to Clause (5) of this subsection [29 U. S. C. §186 (c)(5)(B)] shall apply to such trust funds." (*S. 1614, 85th Cong., 1st Sess.,* referred to at Appellants' Reply Br. pp. 19-20.)

The "primary intent of Congress" referred to in the *Ryan* decision was to place "explicit limitations on welfare funds" because "Congress was disturbed by the demands of certain unions that the employers contribute to *'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit".* (350 U. S. at p. 304. Emphasis added. This language is quoted in this Court's opinion at p. 14, and discussed in footnote 4 thereof at p. 7.) In addition to these limitations on "welfare funds" set forth in Section 302(c)(5), Congress adopted a "broad prohibition" in Section 302(a) and (b) to deal with *"a case where the union representative is shaking down the employer."* (350 U. S. at pp. 304-306, quoted in this Court's opinion at p. 7.)

Consideration of the actual legislative history of this "highly specialized restriction on the legality of employers' agreements to make payments to employee representatives" (*Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 348 U. S. 437, fn. 2 of opinion) demonstrates that the evil which Congress sought to reach was to prevent "kickbacks", "bribes"

or other forms of "labor racketeering", as well as to prevent arbitrary dispensation by union officers of funds obtained through employer contributions made pursuant to collective bargaining agreements. (See Appellees' Br. pp. 27-32.)

Since there was no evidence or contention in this case that any of the employers were "tampering with the loyalty of union officials" or that "disloyal union officials" were "levying tribute upon employers" (Learned Hand, J., dissenting in the *Ryan* case, 225 F. 2d at p. 426, quoted in this Court's opinion at p. 7), or that the union-appointed members of the Joint Industry Board were engaging in any such "practices which are wrong and harmful to labor-management relations and inimical to public welfare" or "which are potentially wrong in that field (*United States v. Connelly,* 129 Fed. Supp. 786), the result reached by the Court herein implies that all jointly-controlled labor-management trust funds not falling within the exception provided by Section 302(c)(5) are deemed illegal *per se,* without regard to the purpose of the legislation. If such conclusion was not intended, then we respectfully urge that the opinion should be clarified accordingly.

V.

Aiding in the Settlement of Labor-Management Disputes and Providing Joint Arbitration Machinery Does Not Constitute "Dealing With Employers" as a Labor Organization.

In reaching its conclusion that "the Joint Industry Board satisfies that part of the [statutory] definition of 'labor organization' which recites that it is one which exists for the purpose in whole or in part of dealing with employers concerning grievance, labor disputes, wages, etc."

(Opinion, p. 11), this Honorable Court relies upon a portion of Paragraph 17 of the addenda to the Local 75 agreement providing that "Any disputes arising out of this agreement shall be referred to the Joint Industry Board." [R. 27, quoted at Opinion, p. 10.]

Apparently, the Court overlooked the express proviso to that arrangement which declares that "The Joint Industry Board shall not alter or amend the Bargaining Agreement without a majority vote of both the Union and the Association membership." [R. 28.] Thus, the Joint Industry Board was precluded from "negotiating a new contract or a contract containing the proposed modifications" which function comes within the statutory obligation of the employer and the representative of the employees to *bargain collectively* with each other, and to execute a written contract incorporating any agreement reached if requested by either party. (29 U. S. C., Sec. 158(d).)

This Court also relied upon the second stated purpose as expressed in the Joint Industry Board Trust Agreement [R. 30, quoted at Opinion, p. 10; see also p. 8, footnote 5] which confers upon the Joint Industry Board the following function:

> "To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above-named association, its members and all other employers of union members who are signatories to agreements with the union."

Here again, the Court apparently overlooked the express provisions of the Trust Agreement which limits the power of the Board to "conduct its affairs" by adopting "rules and regulations" which must be "consistent with all the terms and conditions of . . . the Bargaining Agree-

ment" and "not inconsistent with the Constitution and By-Laws of the Local Union and its International, the Sheet Metal Workers' International Association, or the Constitution and By-Laws of the [Employer] Association signatory hereto." [Paragraph 4 of the Trust Agreement, R. 39.]

The addenda to the Local 75 Union Agreement clearly states that any disputes arising therefrom which are "referred to the Joint Industry Board" shall be handled according to the "provisions for the settling of all disputes as set forth in the 'Trust Agreement' of the Joint Industry Board" [Paragraph 17, R. 27.] Let us re-examine the Trust Agreement to determine exactly what those provisions are.

The Joint Board is expressly empowered to "set up and administer a joint arbitration committee and to provide further arbitration procedures should the Joint Arbitration Committee be unable to decide or resolve a dispute." [Paragraph A-3, R. 30, quoted at Opinion, p. 8, footnote 5.] More specifically, "In the event that the Board is unable to reach agreement, the members thereof shall choose an impartial person who shall act as arbitrator", or if unable to do so within 10 days, "shall request the President of the University of San Francisco to designate an arbitrator" whose decision "shall be final and binding on all parties." [Paragraph O, R. 40.] The opinion of this Honorable Court herein makes absolutely no reference to this arbitration procedure, which roughly corresponds to that set forth in Section 302(c)(5) for breaking deadlocks within a board of trustees over the administration of a welfare fund.

(Thus, Section 302(c)(5) requires that "employees" and "employers" shall be "equally represented" and "in

the event the employer and employee groups deadlock" the trust agreement must provide that "the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office.")

The term *"dealing with employers"* as used in Sec. 152(5) of Title 29 U. S. C. obviously refers to something other than the functions of *conciliation, mediation,* and *voluntary arbitration* performed by the Joint Industry Board. (See Appellees' Br. pp. 55-59.) In the *Ryan* case, *supra,* the Supreme Court partially adopted the dissenting views of Judge Learned Hand in the Second Circuit (255 F. 2d 417) to hold that in using the term "representative" in Section 302 Congress meant to include "any individual or labor organization" that has been *"authorized by the employees to act for them in dealings with their employers."* (350 U. S. at pp. 302 and 306) without restricting the term to the "exclusive bargaining representative."

On the other hand, the *Ryan* decision made it plain that Section 302 only prohibits payments to labor unions and their officials that *"represent employees in their relations with the employers."* (See Appellees' Br. pp. 19-20.) Stressing the fact that "collective bargaining" is "conducted by individuals who represent labor", the Supreme Court held that "payments to Ryan individually" were prohibited by Section 302, because the ILA President's "relationship" brought him within the term "representative", that is, he "represented employees both as a union president and principal negotiator."

Speaking for the unanimous Supreme Court in *Ryan,* Mr. Justice Clark noted that "as president of the representative union, he [Ryan] was a member of its wage scale committee and signed all negotiated agreements" and declared, "We do not decide whether any official of a union is ex officio a representative of employees under Section 302" (350 U. S. at p. 301).

The legislative history of the original Wagner Act definitions of the related terms "representative" and "labor organization" which have been carried forward without change in the Taft-Hartley Act (See Opinion, p. 10) makes it clear that the phrase "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" is synonymous with the term *"bargain collectively"* which first appeared in Section 8(5) of the 1935 Act and reappears in the 1947 Act within the language of Section 8(a)(5) and 8 (b)(3), codified as 29 U. S. C., Secs. 158(a)(5) and 158(b)(3).

As defined by Section 158(d) of Title 29, such collective bargaining consists of "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

Clearly, the Joint Industry Board in the present case is not the "representative of the employees" for purposes of *dealing* in the sense of *negotiating* or *bargaining collectively* with the employers with respect to the making of an agreement or contract relating to wages, hours or

working conditions or with respect to grievances, labor disputes, or questions arising under the collective bargaining agreement. No such allegation was made by the "Complaint" herein which merely alleged that the "International Association, Local Union No. 104, Local Union No. 75 and W. R. White are representatives of the employees of plaintiffs." [R. 8.] The "Answer" admits [R. 12-13] and paragraph 2 of the "Stipulation of Facts" recites [R. 17] only that Local 104 is the "representative of the employees of plaintiffs." Although the "Stipulation of Facts" recites in paragraph 4 [R. 18] that Local 75 is the "representative of employees" of "employers, other than the plaintiffs", this Honorable Court concluded that Local No. 75 was acting "on behalf of these members of Local 104 temporarily in the northern counties and in respect to the working conditions and wage scales of these 104 members" and "was participating in the Joint Industry Board on behalf of the plaintiff's (sic) employees or some of them" when that local "made the deal for the 2½¢ per hour and when it undertook to call a strike of the Local 104 members in respect to the northern counties jobs." (Opinion, pp. 11-12.)

We respectfully suggest that upon the state of the record just outlined, it is clear that Locals 75 and 104 of the Sheet Metal Workers International are "labor organizations" within the meaning of subdivision 5 of Section 152, but it does not follow as a legal consequence that the Joint Industry Board exists wholly or partially for the purpose of "dealing with employers" so as to itself constitute a "labor organization", representing any employees of the appellant employers.

VI.

Participation by a Bona Fide Labor Union in a Jointly-Controlled Labor-Management Board Is Not Equivalent to Employee Participation in a Labor Organization.

This Honorable Court concluded in its opinion (p. 11) that the Joint Industry Board was "an organization in which employees participate" within the meaning of 29 U. S. C., Sec. 152(5) because certain San Francisco employees of eight of the plaintiffs (members of Local 104 temporarily employed in the six northern counties) were then being represented by Local No. 75 for certain limited purposes.

The "clear legislative intent" that "participation by representation would satisfy the meaning of this definition as applied to the problem here presented" which this Honorable Court thus found to exist (Opinion, p. 11), does not appear to be reflected by the history of the legislation, either during Congressional consideration of the original Wagner Act of 1935 or during the Taft-Hartley Act debates of 1947.

The broad definition of a "labor organization" in Section 152(5) of Title 29 to include "any organization of any kind, or any agency or employee representation committee or plan in which employees participate" was initially adopted, as shown by the legislative history, in conjunction with the prohibition of Section 8(2) of the original Wagner Act, which now appears as 29 U. S. C., Section 158(a)(2) making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

When the House Labor Committee recommended the continuation of such a prohibition against employer domination of, or interference with "any labor organization" in the Hartley bill in 1947 (Section 8(a)(2) of *H. R. 3020, 80th Cong., 1st Sess.*), it reported that . . .

> "During World War II, many employers, with the help of the Government, set up labor-management committees with which they discussed matters of mutual interest . . . but section 8(a)(1) and (2) forbid the employer to create a formal organization having members among employees generally or other common characteristics of a labor union." (*House Report No. 245, 80th Cong., 1st. Sess.*, p. 33.)

The Hartley bill, as passed in the House of Representatives on April 17, 1947 would have extended the prohibition against an employer contributing financial support directly to a "labor organization" by forbidding the employer to make "payments of any kind" to "any fund or trust established by such organization, or to any fund or trust in respect of the management of which, or the disbursements from which, such organization can, either alone or in conjunction with any other person, exercise any control directly or indirectly." (Section 8(a)(2)(c)(ii) of *H. R. 3020, 80th Cong., 1st Sess.*) This amendment forbidding payments by employers to "any fund over which the union has any control even though it is jointly administered with the employer" was rejected by the Senate and thus not included in the final measure. (See Appellees' Br. pp. 16-18 for the detailed legislative history.)

Thus, the Congress itself recognized that a jointly-administered fund or trust in which "employees participate

through the union that represents them" does not constitute a labor organization "in which employees participate" so as to preclude an employer from contributing financial support to such fund or trust.

While a national labor federation such as the American Federation of Labor and the Congress of Industrial Organizations is concededly a "national or international labor organization" composed of constituent unions through which individual employees may be said to obtain "participation through representation" (*N.L.R.B. v. Highland Park Mfg. Co.,* 341 U. S. 322), there is no legal precedent for converting a joint labor-management board into a "labor organization" because it is operated on a bi-partite basis by representatives of an employer association and a bona fide labor union not itself subject to employer domination or receiving financial support by an employer.

VII.

The Joint Industry Board Is Not a Part of Any Labor Union nor a Mere Adjunct Thereto.

This Honorable Court rejected the argument of appellees that the Joint Industry Board was an "independent unit or entity", concluding that, under "the special and peculiar provisions of this so-called trust agreement", the Board was a "mere adjunct of the union" because "the union members of the board were required to act separately, by their own majority" and were "subject to recall or discharge at the will of the union." (Opinion, pp. 14-15.)

In so deciding, the Court apparently overlooked the fact that Congress deliberately rejected the Senate proposed definition of "representative" in adopting Section 302,

which would have included "any organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative." (See Appellees' Br. pp. 18-19.) Moreover, as finally adopted, Section 302(c)(5) expressly approved of trust agreements for welfare funds under which "employees and employers are equally represented in the administration of the fund" by "two groups" of trustees, specifically designated as "employer and employee groups." Because of the likelihood of unit voting by these two groups, Congress also prescribed the method by which an impartial umpire could "decide such dispute" or "break such deadlock" whenever "the employer and employee groups deadlock on the administration of such fund." (It is significant that the statute thus contemplated "group" voting among the trustees and does not speak of a tie-vote among the individual trustees. The selection of the impartial umpire is thus required to be made by agreement of "the two groups" or by appointment of the appropriate district court "on petition of either group".)

Far from being "special and peculiar", the group voting provisions of the Joint Industry Board Trust Agreement merely reflect the pattern prescribed for welfare fund trusts by Section 302 itself. As the trial court herein expressly found . . .

> "The Board consists of six members for the employers and six members for the union. Decisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members. . . . [*T*]*he power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members.*" [R. 43, emphasis added. *Cf.*, Opinion, pp. 9-10.]

> *"If the employer members refuse to sanction an expenditure for any reason, there is a provision for arbitration in the agreement."* [R. 48, emphasis added. *Cf.,* Opinion, pp. 14-15.]

When it concluded that "Action could be taken only if the union members as such, by a majority of those representing the union, agreed to it" and that in case of a dispute referred to the Joint Industry Board for settlement the point made by the employer could only be conceded "by union action through vote of a majority of the union members" (Opinion, p. 15, footnote 8 and accompanying text), this Honorable Court apparently overlooked the terms of the Trust Agreement whereby deadlocks among the members of the Board may be resolved by "an impartial person who shall act as arbitrator" to be designated by the President of the University of San Francisco, if not mutually selected by the two groups within a specified reasonable time. [Paragraph O, R. 40.]

The assumption that the union-appointed trustees "were compelled to take orders from the union" or that "the individual members of the Board could not act independently or exercise an independent judgment or act as representatives of a separate entity or organization" is not supported by any evidence in the record. (Opinion, p. 15.) All that was before the Court as to the conduct of these trustees was a stipulation establishing the fact that the Northern Counties Employers' Association and Local 75 each respectively "nominated and appointed" six designated persons as "trustees of said trust" and "said persons so named accepted said nominations and appointed and were and are acting as such trustees." [R. 19.] Appellees would welcome the opportunity to have this matter remanded for the purpose of presenting

evidence as to the true facts regarding the operation of the Joint Industry Board which would conclusively demonstrate the independence of judgment exercised by the individual trustees and wholly dispell any doubt as to the ability of the union-appointed Board members to fulfill their fiduciary obligations in an objective manner without being subjected to any "orders from the union." Upon such a remand, appellees would be prepared to present proof of a number of specific cases where "the point made by the employer" was in fact "conceded" without regard to "union action" as such.

Even on the basis of the record as it now stands there is substantial evidence to support the express finding of the trial court that all the members of the Joint Industry Board "will hold the funds in question in trust for the purposes enumerated in the trust agreement." [R. 46.] By declining to pass upon the question as to whether a true trust was here established (Opinion, p. 14), this Honorable Court has failed to consider material circumstances and legal arguments raised by appellees regarding the establishment of the trust fund; the enumerated purposes of the trust; the powers, duties and fiduciary obligations of the trustees; and the beneficial interest of the individual employees and employers in the objects of the trust fund. (See Appellees' Br. pp. 38-65.)

When this Honorable Court concluded that the Trust Agreement provisions regarding revocation of the designation of any representative on the Board at any time at the will of the party making the appointment [Paragraph B-3, R. 32] were "special and peculiar", it apparently did not have in mind the fact that such provisions are not at all unusual in the case of joint labor-management trust funds established by collective bargaining agree-

ments on a multi-employer basis, because of the practical and legal necessity for "equality in administration." (See Appellees' Br. pp. 40-41.)

Local 75 did not and does not regard the Joint Industry Board as if it were a feature of the union itself nor does it construe the Trust Agreement as creating the Board as a "mere adjunct of the union." (*Cf.* Opinion, p. 15.) As the trial court herein expressly found, the Trust Agreement "expressly provides for the separate character of the Board from either of the parties and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members." [R. 47. See also Par. A-5 of the Trust Agreement, R. 31 and Par. O, R. 39.] The functions and procedures of the Joint Industry Board go beyond the collective bargaining activities of the Local Union on behalf of its members, and provide valuable services for all persons engaged in the Heating and Sheet Metal Industry in the Northern California counties whether as employees, applicants for employment, or employers. (See Appellees' Br. pp. 63-65.)

The fact that Local 75 supports the separate and distinct institution of the Joint Industry Board as a desirable means of furthering industrial peace and economic stability in the Heating and Sheet Metal Industry of the six northern counties does not vitiate the finding of the trial court herein that "The Joint Industry Board is not a part of the union. . . ." [R. 47.] Neither, we submit, does the fact that Local 75 may have threatened to induce strike action to compel payment of the agreed-upon 2½¢ per hour dictate a contrary finding. Would a union's threat of economic action to compel payment of agreed-upon employer contributions to defray

the expense of a jointly-administered medical insurance or pension plan for the purpose of enforcing the collective bargaining agreement convert that plan into a mere creature of the union?

It is true in the present case, as in the *Essex Transportation Co.* case, *supra,* 216 F. 2d at pp. 412-413, that the members of the Joint Industry Board "were chosen half and half by the employers' association and this union" and that they function as "two groups" jointly administering a labor-management trust fund, in accordance with "the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations." There is however, no claim that this arrangement has resulted in any diversion of trust funds to the union or any of its officers or representatives, or that the express safeguards in the Trust Agreement in the form of joint control and mutual administration by the two groups of employer-appointed and union-appointed trustees which are equal in number and voting power have proved inadequate to prevent such diversion. The Trust Agreement provides for "a careful accounting and separate deposit system for Joint Industry Board Funds from those of the union." [R. 47.] If any diversion of funds to the union or its officers or any intermingling of funds with those of the union were conceivable in the face of these safeguards, the District Court would clearly have jurisdiction to "enjoin the trustees from making the improper expenditures." [29 U. S. C., Sec. 186(e). See *Upholsterers' International Union v. Leathercraft Furniture Co.,* 82 Fed. Supp. 570, 573, quoted by the trial court herein at R. 47.]

We respectfully urge that a re-examination of the provisions of the Trust Agreement discussed hereinabove should lead this Honorable Court to reconsider its conclusion that the Joint Industry Board is merely a part of the union and as such a "representative" of the employees within the meaning of Section 502.

Conclusion.

Upon all the grounds stated in our petition and the foregoing argument in support thereof, Appellees respectively urge this Honorable Court of Appeals to grant a rehearing herein as prayed for.

Dated: Los Angeles. California, October 14, 1957.

Respectfully submitted,

GILBERT, NISSEN & IRVIN,

By ROBERT W. GILBERT,

Attorneys for Appellees.